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No. 263

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

FROZEN FOOD EXPRESS,
Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston Division

---

JURISDICTIONAL STATEMENT

ROLLO E. KIDWELL
CALLAWAY, REED, KIDWELL & BROOKS
301 Empire Bank Building
Dallas 1, Texas

PETER T. BEARDSLEY
FRITZ R. KAHN
1424 Sixteenth Street, N. W.
Washington 6, D. C.
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

Appellant, American Trucking Associations, Inc., appeals from the judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on March 14, 1957, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, has not been reported, but a copy is attached hereto as Ap-

pendix A. A copy of the judgment of the District Court is attached hereto as Appendix B. The report of the Interstate Commerce Commission is reported at 52 M.C.C. 511. The order of the Interstate Commerce Commission has not been reported but is attached hereto as Appendix C.

JURISDICTION

This is an action to suspend, enjoin and set aside the report and order of April 13, 1951, of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities,* pursuant to section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. §§1336, 1398, 2284 and 2321-2325. The judgment of the District Court was entered on March 14, 1957, and notice of appeal was filed in that court on May 13, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Interstate Commerce Commission v. Home Transfer & Storage Co., Inc.,* 352 U.S. 884, 77 S. Ct. 129; *East Texas Motor Fr. Lines* v. *Frozen Food Express,* 351 U.S. 49, 76 S. Ct. 574; *Frozen Food Express* v. *United States,* 351 U.S. 40, 76 S. Ct. 569.

QUESTION PRESENTED

Whether the District Court was in error in enjoining and setting aside the report and order of the Interstate Commerce Commission insofar as the Commission found and concluded that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick frozen fruits and vegetables were not agricultural commodities (not in-

cluding manufactured products thereof) within the meaning of section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. §303(b)(6)?

STATEMENT

The history of this proceeding is recited clearly and concisely at the beginning of the Supreme Court's earlier opinion herein, *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-43, 76 S. Ct. 569, 569-571. It need not be repeated, though as a matter of convenience that portion of the opinion is attached hereto as Appendix D.

The Supreme Court in its previous disposition of the instant case held the issues raised in the complaint to be justiciable and remanded the proceeding to the District Court for adjudication of the merits. The District Court, without discussing the evidence on which the Interstate Commerce Commission's report and order were based and in apparent reliance on the Supreme Court's decisions in *Interstate Commerce Commission* v. *Home Transfer & Storage Co., Inc.*, 352 U.S. 884, 77 S. Ct. 129, and *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49, 76 S. Ct. 574, found dried egg powder, dried egg yolks, powdered milk, buttermilk and quick frozen fruits and vegetables to be agricultural commodities (not including manufactured products thereof) within the meaning of section 203(b)(6) of the Interstate Commerce Act.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court should be reversed unless it can be said that the Interstate Commerce Commission should have found *as a matter of law* that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables are "agricultural commodities (not including manufactured products thereof)" within the meaning of section 203(b)(6) of the Interstate Commerce Act. Certainly the factual record in

Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, would not have permitted the Commission to reach such a conclusion. On the contrary, the testimony in that proceeding was conclusive that the enumerated items were "manufactured" products of agricultural commodities.

The testimony in that proceeding was offered almost exclusively by the United States Department of Agriculture and interveners on its side. Neither the motor carriers nor the railroads presented direct or rebuttal evidence. The motor carriers and railroads, as they had before, urged a narrow construction of the agricultural exemption; the Department of Agriculture and the interveners on its side were seeking a broad, or liberal, construction. Nevertheless, the testimony of the witnesses and the exhibits offered by the Department of Agriculture were to the effect that dried egg powder, dried egg yolks, powdered milk, buttermilk and frozen fruits and vegetables were "manufactured" products of agricultural commodities.

Dr. Hugh C. McPhee, Assistant Chief of the Bureau of Animal Industry of the Department of Agriculture, testified as to the numerous livestock items and the various treatments which they undergo. He stated that in his opinion the dehydration of eggs converted the eggs into manufactured products (Transcript, page 907). Dr. McPhee stood as sponsor of Exhibit 26, on page 2 of which dried egg power and dried egg yolks were specifically listed as "manufactured" agricultural commodities.

Assistant Chief Earle O. Whittier of the Division of Dairy Products Research, Bureau of Dairy Industry, United States Department of Agriculture, was the expert witness on the dairy group of agricultural commodities and the various processing treatments which they undergo. Exhibit 25, which he sponsored, indicated the fer-

menting, curdling, churning, concentrating or drying of milk, skim milk or cream to be manufacturing processes and listed dried milk and buttermilk to be "manufactured" products.

Dr. Victor R. Boswell, Principal Horticulturist of the Department of Agriculture's Bureau of Plant Industry, testified as to the vegetable group. Dr. Boswell distinguished between natural freezing, as in the case of parsnips left in the ground to freeze, and the artificial freezing of a vegetable after it has been cleaned and otherwise prepared and then blanched or scalded before quick freezing (Transcript, page 972). Likewise, when ascorbic acid, sugar or sirup is added in the quick-freezing treatment, Dr. Boswell said, such addition would convert the commodity into a manufactured product (Transcript, page 974). Dr. Boswell sponsored Exhibit 27, which showed frozen vegetables to be "manufactured" agricultural commodities. As used in Exhibit 27, the term "freezing" was intended to identify the entire "quick-freeze" process, including the preparatory steps preceding freezing; the freezing alone was said not to constitute manufacturing.

Head Horticulturist Dr. John R. Magness of the Division of Fruits and Vegetable Crops and Diseases, Bureau of Plant Industry, United States Department of Agriculture, testified as to the fruit group of agricultural commodities. Dr. Magness observed that the quick-freezing of fruits generally involved the addition of ingredients other than the fruit that is being frozen, particularly such ingredients as sugar or sirup. He concluded that, if ingredients other than the fruit were added, the frozen mixture should be regarded as a manufactured product (Transcript, pages 1091-1092). The sugar that is added penetrates the fruit; it becomes an integral part and cannot be separated again. That, he said, constitutes "manufacturing" (Transcript, page 1117). Accordingly, Exhibit 31, for which Dr. Magness stood sponsor, listed quick-

frozen fruits as "manufactured" agricultural commodities.

The foregoing summarizes the testimony and exhibits pertaining to dried egg powder, dried egg yolks, powdered milk, buttermilk and frozen fruits and vegetables. There was no dissention from the consistent expression of opinion of the Department of Agriculture's well-qualified witnesses that these were "manufactured" agricultural commodities. The report and order recommended by Hearing Examiner C. Evans Brooks, served July 29, 1949, properly found that the dehydrating of eggs (Sheet 42), the fermenting, curdling or drying of milk, cream or skim milk (Sheet 42) and the quick-freezing of fruits and vegetables (Sheet 39) created new or different products, having distinctive names, characteristics or uses, which by any proper test fell in the category of "manufactured" products. No exceptions were noted to the Examiner's findings with respect to these products (52 M.C.C. 511), and the Commission's conclusions simply affirmed these findings.

Had the Commission reached any other conclusions—had it found that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables were not new and different products, separate and distinct from the commodities from which they were derived—the motor carriers and the railroads surely would have gone to court to have the report and order set aside. What court would not have found for the complainants on the ground that the assailed findings were completely unsupported by and contrary to the evidence? What a paradox that within a short span of fixe years the aura of the proceeding should have been so dispelled that the District Court could actually say that, in the face of a solid wall of evidence to the contrary, the Interstate Commerce Commission should have found *as a matter of law* that dried egg powder, dried

egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables are "agricultural commodities (not including manufactured products thereof)" within the meaning of section 203(b)(6) of the Act.

Whether the findings set aside by the District Court represented questions of law or fact, whether the Commission's conclusions were to be binding upon the Court or were only to be given great weight and whether the District Court properly reviewed the Commission's decision or exceeded the bounds of judicial review—these are largely academic questions that can be left for treatment in the brief. What matters here is that the District Court has insisted on a construction that completely disregards the comprehensive and convincing evidence before the Commission. The Court set itself up as knowing more about these agricultural commodities than the Commission, knowing more than the Department of Agriculture's witnesses—and all on the thin thread that the commodities should have been found to be "manufactured" *as a matter of law*. The Supreme Court should note probable jurisdiction herein to permit appellant to argue on brief and orally that the Interstate Commerce Commission under no circumstance could have found the commodities not to have been "manufactured".

The question is substantial. Involved is the transportation of 3,248,000 pounds of dried egg powder and 9,270,000 pounds of dried egg yolks (Statistical Abstract of the United States 1956, Washington, D. C., 1956, p. 691), 1,516,107,000 pounds of powdered milk (*Id.*, p. 690) and 2,227,365,000 pounds of frozen fruits and vegetables (National Association of Frozen Food Packers, *Frozen Food Pack Statistics:* 1956, Washington, D. C., 1957, Parts 1 & 2, p. 4) produced annually within the United States. Under the consistent construction and general understanding prevailing since the outset of motor carrier regulation in 1935 the for-hire transpor-

tation of these commodities has been accomplished by Interstate Commerce Commission-regulated common and contract carriers. The regulated carriers desire to continue to participate in the movement of this traffic, but they cannot do so if they must encounter the untrammeled competition of unregulated truck operators. The effect of the District Court's decision is to make this freight available to all comers, irrespective of need for service, fitness of operator, reasonableness of rates, coverage of insurance and so on. The adverse effect upon the transportation system of the Nation—and the public that is dependent upon it—of the resultant cutthroat competition is generally recognized. The reversal of the District Court's decision and the sustaining of the Interstate Commerce Commission's report and order that dried egg powder, dried egg yolks, powdered milk, buttermilk, and quick-frozen fruits and vegetables are "manufactured" agricultural commodities within the meaning of Section 203(b)(6) will help greatly towards restoring stability and responsibility in the transportation of these items.

WHEREFORE, the Supreme Court should note probable jurisdiction herein and should reverse the decision of the District Court for the Southern District of Texas, Houston Division.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

ROLLO E. KIDWELL
CALLAWAY, REED, KIDWELL & BROOKS
301 Empire Bank Building
Dallas 1, Texas

PETER T. BEARDSLEY
FRITZ R. KAHN
1424 Sixteenth Street, N. W.
Washington 6, D. C.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for the appellant herein and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twelfth day of July, 1957, I served copies of the foregoing Jurisdictional Statement on the several parties, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Honorable J. Lee Rankin, Solicitor General, U. S. Department of Justice, Washington 25, D. C.; by mailing copies in a duly addressed envelope, with postage prepaid, to James E. Kilday and Charles S. Sullivan, Jr., Esquires, Special Assistants to the Attorney General, U. S. Department of Justice, Washington 25, D. C.; and by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Malcolm R. Wilkey, Esquire, United States Attorney, Houston, Texas.

2. On the Interstate Commerce Commission, by mailing copies in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane and C. W. Johns, Esquires, Office of the General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Department of Agriculture, by mailing a copy in a duly addressed envelope, with postage prepaid, to Charles W. Bucy, Esquire, Office of the General Counsel, U. S. Department of Agriculture, Washington 25, D. C.

4. On Frozen Food Express, the plaintiff before the District Court, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Carl L. Phinney, Esquire, Phinney and Hallman, 617 First National Bank Building, Dallas, Texas.

5. On the railroad interveners, by mailing a copy in a duly addressed envelope, with postage prepaid, to Carl

Helmetag, Esquire, Pennsylvania Railroad, Transportation Center Building, Philadelphia, Pennsylvania; by mailing a copy in a duly addressed envelope, with postage prepaid, to Charles P. Reynolds, Esquire, Shoreham Building, Washington 5, D. C.; and by mailing a copy in a duly addressed envelope, with postage prepaid, to James W. Nisbet, Esquire, Association of Western Railways, 280 Union Station Building, Chicago 6, Illinois.

6. On other intervening parties, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Edwin N. Bell, Esquire, Esperson Building, Houston, Texas; by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to J. C. Hutcheson, III, Esquire, Esperson Building, Houston, Texas; by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Lee Reeder, Esquire, Reeder, Gisler and Griffin, 1012 Baltimore Avenue, Kansas City, Missouri; and by mailing a copy in a duly addressed envelope, with postage prepaid, to Dale C. Dillon, Esquire, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

PETER T. BEARDSLEY

1424 Sixteenth Street, N. W.
Washington 6, D. C.
July 12, 1957

APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Phinney & Hallman (Carl L. Phinney) of Dallas, Texas; for Plaintiff.

Walter D. Matson, U. S. Department of Agriculture of Washington, D. C.; for U. S. Department of Agriculture.

James H. Durkin, U. S. Department of Justice, of Washington, D. C.; for United States of America.

Leo H. Pou, Interstate Commerce Commission, of Washington, D. C.; for Interstate Commerce Commission.

Peter T. Beardsley of Washington, D. C.; for American Trucking Associations, Inc.

Dale C. Dillon of Washington, D. C.; for Com-Carrier Conference-Irregular Route and Contract Carrier Conference.

Carl Helmetag of Philadelphia, Pennsylvania, and James W. Nisbet of Chicago, Illinois; for Class I Railroads.

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial review, was reversed by the Supreme Court (351 U.S. 40), and the action remanded for consideration on the merits. This requires a review of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under § 303(b)(6) of Title 49, U.S.C.A. their carriage by a motor carrier is substantially free from ICC regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (pack-

aged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows: frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (128 F. Supp. 374 at 379), we considered slaughtered cattle, fresh and frozen meat and meat products to be non-exempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U.S. 49), wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn.* v. *U. S.* (207 U.S. 556 at 562).

> ". . . Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U.S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'"

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage.

we cannot say that it has been 'manufactured' within the meaning of § 203(b)(6)."

Applying this most recent test, a three judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc.* v. *U. S.* (144 F. Supp. 814) held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company* v. *U. S.*, 141 F. Supp. 599). This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 (352 U.S. 884).

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' sheives, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid ICC control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits

or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

For the reason set forth in our opinion *Frozen Food Express* v. *U. S.* (128 F. Supp. 374 at 379 et seq.), we hold to be non-exempt the following: slaughtered cattle; fresh meat; meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product", it may well be that these items illustrate the point at which processing merges with manufacturing.[1]

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[1] In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the Plaintiff contends to the contrary.

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accord with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. Hutcheson, Jr.
Chief Judge, Fifth Circuit

/s/ Ben C. Connally
United States District Judge

/s/ T. M. Kennerly
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951 in a proceeding docketed by the Commission as No. MC-C-968, *De-*

termination of Exempted Agricultural Commodities, is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanut shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leafs are not agricultural commodities within the meaning of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)); and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March 1957.

/s/ J. C. Hutcheson, Jr.
J. C. Hutcheson, *Chief Judge*
United States Court of Appeals
for the Fifth Circuit

/s/ Ben C. Connally
United States District Judge

/s/ T. M. Kennerly
United States District Judge

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of April, A. D. 1951.

No. MC-C-968

DETERMINATION OF EXEMPTED AGRICULTURAL COMMODITIES

No. MC-107669

NORMAN E. HARWOOD CONTRACT CARRIER APPLICATION

It appearing, That by order entered in No. MC-C-968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M.C.C. 597, and order in No. MC-107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc., and others, the Commission reopened the proceeding in No. MC-107669 for further hearing on a consolidated record with No. MC-C-968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its

report on oral argument herein containing its findings of fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC-107669, are hereby referred to and made a part hereof:

It is ordered, That the proceeding in No. MC-C-968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC-107669 be, and it is hereby, vacated and set aside.

And it is further ordered, That the application in No. MC-107669, be, and it is hereby, denied.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

APPENDIX D

(Excerpt from opinion of Supreme Court of the United States in *Frozen Food Express v. United States*, 351 U.S. 40, 41-42, 76 S. Ct. 569, 569-571.)

* * * *

Part II of the Interstate Commerce Act; 49 Stat. 543, as amended, 49 U.S.C. § 301 et seq., 49 U.S.C.A. § 301 et seq., grants the Commission pervasive control over motor carriers. Common carriers and contract carriers by motor vehicle, subject to that part of the Act, must have a certificate of public convenience and necessity or a permit issued by the Commission. §§ 206(a), 209(a). The Commission has powers of investigation to determine if a motor carrier has complied with the Act; and it has authority to issue an order compelling compliance. § 204 (c). These requirements for a certificate or permit * are not, however, applicable to "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." § 203(b)(6).

The controversy in these cases centers around this "agricultural" exemption. After an investigation instituted on its own motion, the Commission issued an order that specified commodities are not "agricultural" within the meaning of § 203(b)(6).

The hearing to determine the meaning and application of the term "agricultural * * * commodities (not including manufactured products thereof)" as used in § 203(b)(6) was held before an examiner. It was a

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* Exempted carriers are also not subject to the provisions concerning rates and charges, §§217, 218, nor to the requirements concerning bodily injury and property damage insurance §215.

public hearing at which various governmental officials and agencies and various producers, shippers, and carriers appeared and presented evidence. The Commission's decision was in the form of a report and order. 52 M.C.C. 511. The report, which concerns various groups of commodities, covers 71 pages of the printed record. The findings list those commodities that the Commission finds are exempted under § 203(b)(6) and those that are not. The order of the Commission incorporates the "findings" and states that the proceeding "be, and it is hereby discontinued."

Frozen Food Express, the plaintiff, is a motor carrier transporting numerous commodities which the Commission ruled were nonexempt under § 203(b)(6) but which the carrier claims are "agricultural commodities." Plaintiff, who was not a party to the administrative proceeding, instituted suit before a three-judge District Court, 28 U.S.C. § 2325, 28 U.S.C.A. § 2325, to enjoin the order of the Commission and have it set aside, naming the United States and the Commission as defendants. 28 U.S.C. § 1336, 28 U.S.C. § 1336; 49 Stat. 550, as amended, 49 U.S.C. § 305(g), 49 U.S.C.A. § 305(g); 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009. The complaint alleged that plaintiff is a common carrier by motor vehicle, holding a certificate of public convenience and necessity which authorizes it to transport certain commodities between designated points and places; that plaintiff is transporting, in addition to those commodities, commodities which are exempt under § 203(b)(6) and for which plaintiff has sought no authority from the Commission; that the Commission in its order has held the latter commodities nonexempt and accordingly has deprived it of the right granted by the statute; that the order of the Commission classifying certain commodities as nonexempt is unlawful; and that the Commission threatens to enjoin transportation of the commodities which plaintiff claims are exempt. The Secretary of Agriculture

intervened, supporting plaintiff's position on some of the commodities. Other interveners are trucking associations and railroads which support the Commission. The United States as a defendant supports the Commission on some of its findings and opposes it on others.

The District Court, being of the view that the case was controlled by United States v. Los Angeles & S.L.R. Co., 273 U.S. 299, 47 S. Ct. 413, 71 L.Ed. 651, dismissed the action, saying that the "order" of the Commission was not subject to judicial review. 128 F. Supp. 374. The cases are here by appeal. 28 U.S.C. §§ 1253, 2101(b), 28 U.S.C.A. §§ 1253, 2101(b).